95-904

No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

AIRMAN BASIC DAVID PABON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER, AS A MATTER OF DUE PROCESS, THE GOVERNMENT MAY PREMISE A CONVICTION FOR DRUG USE UPON A PERMISSIVE INFERENCE THAT IT IS "MORE LIKELY THAN NOT" THAT A GIVEN NANOGRAM LEVEL OF BENZOYLECGONINE PROVING "USE" ALSO INDICATES "KNOWING" USE WHERE THE GOVERNMENT'S EXPERT WITNESS ACKNOWLEDGES THAT THIS SAME NANOGRAM LEVEL IS EQUALLY CONSISTENT WITH UNKNOWING INGESTION AND GOVERNMENTAL ATTEMPTS TO RULE OUT UNKNOWING INGESTION ARE BASED NOT UPON ESTABLISHED FACTS BUT UPON SPECULATION AND HYPOTHETICAL POSSIBILITIES

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---

PETITION FOR WRIT OF CERTIORARI

The petitioner, Airman Basic David Pabon, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 14 September 1995.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 42 M.J. 404 (1995), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Military Review, issued on 25 March 1994, is located at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 14 September 1995. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY (UNIFORM CODE OF MILITARY JUSTICE) PROVISIONS INVOLVED

Article 112a(a) of the Uniform Code of Military Justice states in pertinent part:

> "Any person subject to this chapter who wrongfully uses . . . a substance described in subsection (b) [cocaine] shall be punished as a court-martial may direct."

MANUAL FOR COURTS-MARTIAL PROVISIONS INVOLVED

Part IV, para 37b(1)(a) and (b) states as follows:

> b. *Elements.*
>
> (1) *Wrongful use of controlled substance.*
>
> (a) That the accused used a controlled substance; and
>
> (b) That the use by the accused was wrongful

Part IV, para 37c(5) states in relevant part:

> ". . . [U]se . . . of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evi-

dence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use . . . was wrongful."

STATEMENT OF THE CASE

On 29 January and 26 February 1992, Petitioner was tried by general court-martial at Eaker Air Force Base, Arkansas. The charge and specification on which he was arraigned, his pleas, and the findings of the court-martial are as follows:

Chg	Art UCMJ	Summary of Offense	Plea	Finding
	112A		NG	G
		Wrongful use of cocaine btwn 29 July 1991 and 5 August 1991.	NG	G

Petitioner was sentenced, by a military judge sitting alone, to be discharged with a dishonorable discharge, to be confined for ten months, and to forfeit $350 pay per month for ten months. R. 381. On 20 April 1992, the Convening Authority approved the findings and sentence as adjudged. In an unpublished opinion (at Appendix B), the Air Force Court of Military Review affirmed the approved findings and sentence on 25 March 1994. The U.S. Court of Appeals for the Armed Forces subsequently granted review of Petitioner's case to determine whether the evidence of record, as relayed forthwith, was legally sufficient to support Petitioner's conviction.

Mr Bill Tucker, an admitted drug abuser and OSI (Office of Special Investigations) informant, R. 187, testified that on 3 August 1992 at approximately 1800 hours, he observed Petitioner purchase a twenty-dollar ($20.00) "rock" of crack cocaine from an individual known as Mr Weaver. R. 200, 301. At the time of his observation, Mr Tucker was some five to ten feet away from the

transacting parties. R. 300. He never actually saw the "rock" purportedly purchased by Petitioner. See R. 302. Neither did he see how much Petitioner allegedly paid for it; he saw one bill, of unknown denomination, pass from Petitioner to Mr Weaver. R. 302. He seems to base most of his knowledge about the occurrence on what Mr Weaver is alleged to have subsequently told him: "Chico [Petitioner] just bought a rock for 20 dollars." R. 302. (Mr Weaver did not testify at Petitioner's trial.)

Mr Tucker further testified (on direct examination) that $20 worth of crack cocaine usually amounted to " 'bout a quarter gram." R. 299. He also affirmed the following statement/query of trial counsel:

> "And when you purchase crack cocaine or when you just purchase regular cocaine in the powder form, is it always a hundred percent pure? Is there as [sic] possibility that that coke may only, say, be fifty percent pure, with fifty percent of it being cut and isn't really cocaine?"

On re-direct, when asked how many "hits" an individual would get from pipe-smoking a quarter-gram rock of crack cocaine, Mr Tucker testified, "approximately four." R. 303.

On cross-examination, Mr. Tucker stated that he'd never seen Petitioner use cocaine. R. 303. He also testified that at the time he observed Petitioner's purported purchase of crack cocaine, he did not see the Petitioner with a pipe or other means of smoking cocaine. R. 303. Mr. Tucker agreed with defense counsel's summary of his testimony thusly, ". . . [A]s far as you know, Airman Pabon didn't use the cocaine. You just saw him purchase it." R. 303.

The Government sought to prove Petitioner's alleged use of cocaine by means of test results indicating the presence of a cocaine metabolite, benzoylecgonine [hereinafter "BE"], in Petitioner's urine. The test results re-

lated to a sample of Petitioner's urine which had been collected on the evening of 4 Aug 91. R. 80, 100; App. EX. VII. Prosecution Ex. 1. To explain these test results, the Government called to the stand Dr. William D. Sweet, an employee of the Drug Testing Division of Armstrong Laboratory at Brooks Air Force Base. R. 323. Dr Sweet was offered to and accepted by the trial court as an expert in the field of forensic toxicology. R. 323-24.

Through Dr Sweet's testimony, the Government established that BE cannot be produced by the human body without an individual having previously ingested cocaine, R. 325; that assuming an intact chain of custody on a urine specimen containing BE, one can say with scientific certainty that the specimen's provider had to have previously used cocaine, R. 326; that the sample submitted by Petitioner tested positive for BE at 1793 nanograms per milliliter of urine, R. 327; that the legal "cut-off" for a positive result was 150 nanograms per milliliter, R. 327; that the procedures used to test Petitioner's urine sample are reliable and scientifically acceptable, *see generally* R. 327-330; and that the 1793 nanograms of BE was consistent with an individual who had "snorted" cocaine two or three days before. R. 331.

At this point in the direct examination, trial counsel presented Dr Sweet with a hypothetical. R. 332. The hypothetical revolved around one "hit" from a quarter-gram of fifty percent pure crack cocaine. In presenting this hypothetical to the witness, trial counsel tried to present it in terms of quantity of pure cocaine consumed. He rationalized that one-quarter (¼) gram of 50% purity=one-eighth gram pure cocaine; that one of four hits (i.e. one-fourth) from this one-eighth gram=one-twenty-fourth gram of pure cocaine.[1] Dr Sweet testified that the one-twenty-fourth gram of pure cocaine would be about

[1] Obviously, trial counsel erred in his arithmetic. One-fourth of one-eighth is one-thirty-second (1/32).

30-35 milligrams of cocaine; that consumption of this amount twelve to twenty-four hours prior to collection of a urine sample would yield results consistent with 1793 ng/ml of BE in the urine.

On cross-examination, defense counsel resurrected trial counsel's hypothetical, this time asking what Dr Sweet would expect the BE level to be if one had smoked a quarter-gram of 50% pure crack cocaine twenty-four hours prior to giving a urine sample. To this Dr Sweet replied:

> "If it were within 24 hours, at about 24 hours, it would be, for 125 milligrams of real cocaine, it would be considerably higher. I cannot quite regenerate the curves. It is difficult for humans to think in terms of exponentials or logarithms, but it would be considerably higher than 1700 nanograms. But there again, as you mentioned, the concentration depends on a number of things, largely the fluid intake of the individual, how fast urine is being produced or, in other words, how diluted or concentrated the urine is." R. 333.

Dr Sweet stated on cross-examination that 1793 nanograms of cocaine was consistent with unknowing ingestion. R. 333-34.

The military judge then question Dr Sweet, asking what he meant by 1793 nanograms being "consistent with" unknowing ingestion. Dr. Sweet answered thusly,

> "It means that it is possible for an individual to be given a small-enough dose without their knowledge and with no sufficient physiological or psychological symptoms to be aware that there was some sort of pharmacologically-active drug that had been administered to them and still come up with this value." R. 334.

On re-direct, Dr Sweet affirmed that it was fair to say that "any time an individual tests positive for BE at 1700 nanograms per milliliter, that every time there's a possibility it is unknowing ingestion." R. 336.

Subsequent to this, trial counsel, R. 336-37, the military judge, R. 337-38, and defense counsel, R. 338, once again all raised the previously presented hypotheticals:

> TC: "Now I want to give you a hypothetical one more time just to make sure we're all straight. Captain Russell touched on it also. We have a quarter-gram of rock that is fifty percent pure, so an eighth of a gram of cocaine, and that gives four hits. You said if—to Captain Russell, if he smokes all of that rock, smokes all eight of that gram, 125 milligrams, that 24 hours later you would expect it to be considerably higher than 1793, that's what you said depending upon. . .
>
> Dr S: "Given the urine flow rate, yes. . .
>
> TC: "Okay.
>
> Dr S: "but that is correct.
>
> TC: "But again, if that individual took one hit off that crack pipe, 30 milligrams, would the 1793 be a possibility, be in the ballpark?
>
> Dr S: "Yes.
>
> TC: "All right, and again, this 1,793 nanograms per milliliter, another just as likely possibility that could be the result of heavier use, two, three days beforehand. Is that . . .
>
> Dr S: "That's correct.
>
> * * * *
>
> MJ: "You've said from four hits you would expect more, from this hypothetical rock. . .
>
> Dr S: "Yes.
>
> MJ: ". . . that we're dealing with. Four hits, you would expect more than 1793, one hit is within the ballpark. Where does two hits fall?
>
> Dr S: "A little higher. What we're talking about in smoking crack, it depends pretty heavily on tech-

nique because the heat needed to volatilize the crack cocaine can also destroy it, and so we wander into worrying about those kinds of things, as well. You started out with 125 or 250 milligrams of real cocaine. It depends on how much gets in the lungs, depends on how much is deposited in the pipe, how much is destroyed by the heat, a whole large number of other factors. So it's a little—it's hard to give good, clear scenarios.

MJ: "I think you may have answered my question right there.

Dr S: "Okay.

MJ: "But please continue.

Dr S: "At—assuming delivery is essentially a hundred percent efficient, about the best that I can suggest without going and actually looking at the graph, which would be rather helpful, we'd be talking about something, I think, in the vicinity of 5,000 nanograms.

MJ: "For two hits?

Dr S: "Yeah.

MJ: "Okay.

Dr S: "But I'm quite uncertain about that."

* * * *

DC: "Let me ask you this then. Would it be a fair statement, though, that if someone smoked, and there are various techniques, but if someone smoked a quarter-gram of raw cocaine, that they would still probably, regardless of the technique used, show more than the 1793 nanograms if they smoked the whole thing?

Dr S: "Not necessarily. Again, it would be so technique-dependent that it would be very difficult to say that that would be a fair statement in all situations."

Article 112a of the Uniform Code of Military Justice provides that the offense of illegal drug use consists of two elements: (1) That the accused used a controlled substance, and (2) that the use by the accused was wrongful. See Part IV, para 37b, Manual for Courts-Martial, United States (1995 ed.). According to the Explanation section accompanying Article 112a, *id.* at para 37c(5)—

> ". . . [U]se . . . of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use . . . was wrongful."

In accordance with military case law, it is well established that without the testimony of an expert witness or some other similar explanatory medium, a urinalysis "litigation package" or laboratory result is not, in and of itself, a sufficient basis upon which to premise a finding that one has wrongfully used a contraband substance. *United States v. Murphy,* 23 M.J. 310 (C.M.A. 1987); *United States v. Harper,* 22 M.J. 157 (C.M.A. 1986). As the U.S. Court of Appeals for the Armed Forces has specifically elaborated in *United States v. Hunt,* 33 M.J. 345, 347 (C.M.A. 1991) (citations omitted):

> "If scientific-test evidence is used by the prosecution to meet this burden, it must provide a rational basis for understanding this evidence. If the prosecution fails to offer sufficient expert evidence from which the members may rationally find wrongful use, its case is defective, and a conviction thereon may not stand. The defense's right to attack the prosecution's case on these matters does not relieve the prosecution of its burden to produce understandable and sufficient evidence in the first instance."

In reviewing Petitioner's case on the element of "wrongfulness", the U.S. Court of Appeals for the Armed Forces stated that while the prosecution was required to show that Petitioner had knowingly used cocaine,

> the prosecution was not required to use scientific evidence to show that appellant's ingestion of cocaine was *knowing*, and it did not attempt to do so in the present case. Instead, it relied on a permissive inference of wrongfulness, including knowledge, which can be drawn from proof of presence of the drug's constituent elements in a person's urine.

42 M.J. at 406 (emphasis in original). Upholding the legal sufficiency of the Government's case, the Court held that Dr Sweet's testimony unambiguously linking 1793 ng/ml of cocaine with the possibility of unknowing ingestion did not preclude drawing the inference of knowledge. 42 M.J. at 407.

REASON FOR GRANTING THE WRIT

AS A MATTER OF DUE PROCESS, THE GOVERNMENT MAY NOT PREMISE A CONVICTION FOR DRUG USE UPON A PERMISSIVE INFERENCE THAT IT IS "MORE LIKELY THAN NOT" THAT A GIVEN NANOGRAM LEVEL OF BENZOYLECGONINE PROVING "USE" INDICATES "KNOWING" USE WHERE THE GOVERNMENT'S EXPERT WITNESS ACKNOWLEDGES THAT THIS SAME NANOGRAM LEVEL IS EQUALLY CONSISTENT WITH UNKNOWING INGESTION AND GOVERNMENTAL ATTEMPTS TO RULE OUT UNKNOWING INGESTION ARE BASED NOT UPON ESTABLISHED FACTS BUT UPON SPECULATION AND HYPOTHETICAL POSSIBILITIES

As this Honorable Court has stated, the value of a permissive inference and its validity under the Due Process Clause varies from case to case depending on the strength of the connection between the inference and the underlying facts from which it is drawn. *County Court of Ulster*

Cty v. Allen, 442 U.S. 140, 156 (1979). The test is whether there is a "rational connection" between the basic facts that the prosecution has proved and the ultimate fact presumed such that the latter is "more likely than not to flow from" the former. *Id.* at 165.

In the instant case, in accordance with military precedent (*Murphy*, 23 M.J. 310, and *Harper*, 22 M.J. 157), the Government offered the testimony of an expert witness, Dr. William D. Sweet, to explain its urinalysis "litigation package" thereby directly proving the element of "use" and by inference therefrom the element of "wrongfulness" (i.e. knowing use). The evidence offered by Dr Sweet was, however, confiicting. On the one hand, he stated that 1,793 ng/ml of BE was consistent with someone having "snorted" cocaine several days prior to the urinalysis or someone having smoked one "hit" of crack cocaine within 24 hours of the urinalysis. On the other hand, he affirmed that "any time an individual tests positive for BE at 1700 nanograms per milliliter, that every time there's a possibility it is unknowing ingestion."

In an effort to explain this substantial and absolutely critical discrepancy, the Government resorted to offering general possibilities and hypothetical situations to explain how knowing ingestion might account for the level of BE in Petitioner's urine. The Government was forced to use possibilities and hypotheticals because they had absolutely no knowledge as to how cocaine came to be in Petitioner's system. The most they had was testimony from Mr. Tucker indicating his belief that Petitioner had been in possession of "rock" cocaine. Notably, Mr Tucker had not actually seen the alleged "rock," and he had *never* seen Petitioner use cocaine.

While his testimony, if believed, may tend to prove Petitioner's possession of cocaine, it certainly does not prove knowing ingestion—if anything, Mr Tucker's testimony merely indicates Petitioner to be one who places himself in an environment, i.e. in the clear presence of

known drug users and dealers, where unknowing ingestion presents itself as a real possibility.

The Government's complete lack of knowledge as to how the BE came to be in Petitioner's urine is illustrated by the time period of the charged offense and the differing hypotheticals which they offered to Dr Sweet. While Mr Tucker made his supposed observation of Petitioner purchasing "rock" cocaine on 3 August 91, the charge at issue relates to use between 29 July and 5 August 91. If the Government believed the source of Petitioner's positive urinalysis to have been the rock which Mr Tucker allegedly saw him purchase, the charge would only have been for use between 3 and 5 August. Additionally, if the Government had believed Petitioner's positive urinalysis to have resulted from his possession of the "rock" Mr Tucker testified about, they would not have presented Dr Sweet with hypotheticals about "snorting" cocaine two or three days prior to the 4 August urinalysis. Hence the charged time period and the "snorting" hypothetical show Governmental recognition of their lack of any knowledge as to how the BE came to be in Petitioner's urine.

Given Dr Sweet's unrefuted testimony that the 1793 ng/ml of BE in Petitioner's urine was consistent with unknowing ingestion, the Government's lack of knowledge as to how the BE came to be in Petitioner's urine was fatal. It rendered the Government unable to provide the factfinder with a rational means of deciding whether to choose the inference consistent with unknowing ingestion or the inference consistent with knowing ingestion. It destroyed any "rational connection" between the Government's predicate fact of 1793 ng/ml of BE in Petitioner's urine sample and the ultimate fact/element (wrongful/knowing use) sought to be proved; because an inference of unknowing ingestion was equally as likely as knowing ingestion, a conclusion of wrongful use was not "more likely than not" to flow from the

Government's predicate fact of 1793 ng/ml BE in Petitioner's urine sample. To arrive at a possible inference consistent with knowing ingestion would have required facts which the Government was either unwilling or unable to prove: how diluted or concentrated was the urine; how was the cocaine assimilated into the body; if smoked, what was the technique used; what, really, was the quantity assimilated and when; and what, really, was its level of purity?

While the Government did make some effort to "prove" the quantity and quality of the cocaine, their efforts hardly resulted in a basis sufficient to support an inference that was "more likely than not." For purity levels, the Government relied upon the affirmation of Mr Tucker that when one purchases cocaine, it is not always pure; that there is a "*possibility* that that coke may only, say, be fifty percent pure, with fifty percent of it being cut and isn't really cocaine." How is this generalized statement relevant to the cocaine allegedly ingested by Petitioner in the instant case? Mr Tucker offered no testimony as to the purity level of cocaine being sold by Mr Weaver on 3 August 91 (or at any other time). Maybe Mr Weaver's cocaine is 100 % pure; maybe it's 80 % pure; maybe it's 65 % pure. The possibility that any non-specifically identified cocaine may possibly be only 50% pure is not a sufficient basis for a rational fact-finder to conclude that the cocaine somehow ingested by Petitioner was ingested knowingly rather than unknowingly.

With regard to quantities, the Government again relied upon the testimony of Mr Tucker to establish that $20.00 usually bought " 'bout a quarter-gram" of cocaine. Speaking in the precise, scientific language employed by Dr Sweet in arriving at his conclusions, what exactly is " 'bout" a quarter-gram of cocaine? The Government further relied on trial counsel's erroneous calculation of one "hit" being equal to 1/24th of a gram rather than

1/32 of a gram of cocaine. To the extent that Dr Sweet's responses were based upon this error, his replies indicating that a BE level of 1793 ng/ml was consistent with knowing ingestion were also in error and incapable of being relied upon by a rational factfinder.

Trial court's error in calculation would seem, in its own way, to bear out Dr Sweet's disclaimer, that "It is difficult for humans to think in terms of exponentials or logarithms." As this statement indicates, not only were there a lot of unknown variables involved in the facts of ingestion but there was also a variable of unreliability with regard to Dr Sweet's testimony. More than once, he gave indications of being at a loss without access to written references. At one point, after responding to a question by the military judge, he simply stated, "But I'm quite uncertain about that." In another instance he openly acknowledged, that absent more specific facts, "it's hard to give good clear scenarios." Overall, Dr Sweet's responses indicated an inability on his part to accurately respond to the hypotheticals: he did not have access to sufficient facts and references to appropriately respond—consequently, he appears to have guessed a lot.

Understandably, all parties were confused by the situation, as indicated by their repeated inquiries, especially the incessant reference to the same hypotheticals over and over again, "just to make sure we're all straight." R. 336. Ultimately, the expert himself showed confusion. At least three times, Dr Sweet testified that if Petitioner had smoked the entire quarter gram (four "hits") of raw (50% pure) cocaine, he (Dr Sweet) would expect to see a higher level of BE twenty-four hours later than 1793 ng/ml. R. 333, 336, 337. When presented with this hypothetical one last time, Dr Sweet inconsistently replied that one would not necessarily expect to see a higher nanogram level due to the variety of techniques available for smoking crack cocaine; that to say otherwise would not be a fair statement in all situations. R. 338.

The only clear point in Dr Sweet's testimony was that a urinalysis result of 1793 ng/ml of BE was consistent with innocent ingestion. Obviously, this testimony was in conflict with other averments that this level of BE was also consistent with knowing ingestion. Rather than resolving this absolutely critical discrepancy in terms of specific case facts, the Government relied upon general possibilities (purity level of cocaine may possibly be 50%), hypotheticals (snorting cocaine 2-3 days ago; smoking cocaine 24 hours ago), and uncertain "expert" guesstimates (depending upon technique of assimilation; urine dilution; references not before the expert). These general possibilities, hypotheticals, and guesstimates were confusing; ultimatly they failed to offer any basis upon which a rational factfinder could decide which of the two competing inferences to draw from the positive BE level.

By virtue of its own expert, the Government introduced evidence negating any inference of wrongfulness. In so doing, it negated its ability to rely upon such an inference and brought upon itself the burden of having to prove the element of wrongfulness beyond a reasonable doubt. ("If such an issue [of innocent ingestion] is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use . . . was wrongful." Part IV, para 37c, Manual for Courts-Martial, United States (1995 ed).) The Government's desperate resort to various hypotheticals to meet that burden, while inviting speculation as to ways in which wrongful use could possibly have occurred, failed to rule out the *equal* possibility of innocent ingestion. The presence of BE at 1793 ng/ml in Petitioner's urine established only that it was just as likely that the Petitioner's ingestion of cocaine was unknowing as it was knowing.

CONCLUSION

Petitioner is just one of many Air Force servicemembers who have spent time in confinement and received a punitive discharge based upon Prosecutorial bootstrapping of one element onto another. In these so-called UA (urinalysis) cases, the Government proves use by virtue of the reported presence of (invisible) drug metabolites in an accused's urine. Lacking anything other than the urine sample as evidence though, the Government is without knowledge as to how the drug purportedly found its way into the accused's system. Unable to directly prove wrongful use, it relies upon a permissive inference to fill the void. Hence, the Government's entire case consists of nothing more than a urine sample which a laboratory has pronounced positive for drug metabolites.

Given that that is all it takes for a successful prosecution, it is one of every Air Force member's worst nightmares to have a urinalysis result come back positive. (As part of a service-wide random urinalysis inspection program, all Air Force members are subject to being required to provide a urine sample.) If the sample is reported back as positive, the Government automatically has, in essence, a legally sufficient case to sustain a conviction. An innocent accused, on the other hand, is left in the unenviable position of having to explain, when, in fact, he has no idea, why his sample was reported positive for drugs or how drugs may have come to be in his system.

Ironically, the Government has basically no idea either. While they may have evidence that drugs passed through an individual's body, the urine sample doesn't tell them how a substance was ingested, what the circumstances of ingestion were, what the original quantity of ingestion was; or exactly when it was ingested. Nonetheless, they are allowed to infer from the element of use, the element of wrongfulness. Really, from their perspective, the offense is a single-element offense: if they prove the element of use, they've presumptively proved the element of wrongfulness. In courts-martial urinalysis cases, the Govern-

ment has been and continues to prove each and every element beyond a reasonable doubt by simply proving one. Petitioner submits that the one-element prosecution of his two-element conviction was in violation of the Due Process Clause.

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant his petition for a writ of certiorari to the U.S. Court of Appeals for the Armed Forces.

Respectfully submitted,

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December 1995

APPENDICES

APPENDIX A

U.S. COURT OF APPEALS
FOR THE ARMED FORCES

No. 94-0856
CMR 29878

UNITED STATES,
Appellee

v.

DAVID PABON,
Airman Basic U.S. Air Force,
Appellant.

Argued April 3, 1995

Decided Sept. 14, 1995

OPINION OF THE COURT

SULLIVAN, Chief Judge:

1. In early 1992, appellant was tried by a general court-martial composed of a military judge sitting alone at Eaker Air Force Base, Arkansas. Contrary to his pleas, he was found guilty of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. He was sentenced to a dishonorable discharge, as well as confinement and forfeiture of $350 pay per month for 10 months. On April 20, 1992, the convening authority approved this sentence. The Court of Military Review * affirmed in an unpublished opinion on March 25, 1994, 1994 WL 108866.

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* *See* 41 MJ 213, 229 (1994).

2. On November 30, 1994, this Court granted review on the following issue raised by appellate defense counsel:

> WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT A CONVICTION FOR WRONGFUL USE OF COCAINE WHERE THE EXPERT TESTIMONY RELATING TO USE ACKNOWLEDGES THAT INNOCENT INGESTION IS CONSISTENT WITH THE UNDISPUTED NANOGRAM LEVEL OF BENZOYLECGONINE [BE] AND GOVERNMENTAL ATTEMPTS TO REFUTE THIS ARE BASED SOLELY UPON HYPOTHETICAL POSSIBILITIES.

We hold that the evidence presented in this case was as a whole legally sufficient to support appellant's conviction for using cocaine. *See United States v. Ford*, 23 MJ 331, 334-35 (CMA 1987). *See generally United States v. Brown*, 776 F.2d 397, 403 (2d Cir. 1985) (Inferences to support conviction beyond a reasonable doubt need not be "ineluctable."), *cert. denied*, 475 U.S. 1141, 106 S.Ct. 1793, 90 L.Ed.2d 339 (1986).

3. The prosecution in this case called as a witness Mr. Billy Tucker, who testified that he observed appellant appearing to buy rock cocaine on August 3, 1991. He said that he observed appellant receiving a single rock of cocaine from another person for a single bill. He also testified without objection that the seller of the cocaine subsequently told him that appellant bought a rock of cocaine for $20.00.

4. The prosecution also presented evidence that tests performed on appellant's urine on August 14, 1991, were positive for cocaine. Doctor Sweet, accepted as an expert in forensic toxicology, explained the test procedures and results to the court. He testified that appellant's urine sample contained the cocaine metabolite at a level of 1793 nanograms per milliliter. He further testified that such a nanogram count showed cocaine use "with a very

high degree of probabiltiy" and was consistent with a single use within the last 24 hours or heavier use at an earlier time.

5. On cross-examination, Doctor Sweet testified that 1793 nanograms of cocaine was also "consistent with unknowing ingestion." The military judge further questioned him about 1793 nanograms being consistent with unknowing ingestion. Doctor Sweet explained what he meant by "consistent with":

> It means that it is possible for an individual to be given a small enough dose without their knowledge and with no sufficient physiological or psychological symptoms to be aware that there was some sort of pharmacologically-active drug that had been administered to them and still come up with this value.

On redirect examination, Doctor Sweet agreed "that any time an individual tests positive for BE at 1700 nanograms per milliliter, that every time there's a possibility it is unknowing ingestion."

6. Our standard for reviewing cases for legal sufficiency is based on the Supreme Court decision in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). *See United States v. Hart*, 25 MJ 143 (CMA 1987). Our general inquiry is "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact *could* have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 319, 99 S.Ct. at 2789 (last emphasis added). Such a limited inquiry reflects our intent to "give[] full play to *the responsibility of the trier of fact* fairly to resolve conflicts in the testimony, to weight the evidence, *and to draw reasonable inferences* from basic facts to ultimate facts." 25 MJ at 146, *quoting Jackson v. Virginia*, 443 U.S. at 319, 99 S.Ct. at 2789 (emphasis added). We have applied this standard in cases where the prosecution has

employed urinalysis results and expert testimony to show prior drug use. *See United States v. Hunt*, 33 MJ 345 (CMA 1991); *United States v. Mack*, 33 MJ 251 (CMA 1991); *United States v. Ford*, 23 MJ 331 (CMA 1987); *United States v. Murphy*, 23 MJ 310 (CMA 1987); *United States v. Harper*, 22 MJ 157 (CMA 1986).

7. Appellant asserts that the prosecution presented internally inconsistent evidence of his guilt of wrongfully using cocaine. *See United States v. Mack, supra.* He argues that Doctor Sweet's expert testimony concerning the high probability of cocaine use in this case conflicts with this same doctor's testimony that such a nanogram count is consistent with unknowing ingestion. He further contends that such an inconsistency in the Government's proof was not adequately explained by other evidence in this case. Relying on our decision in *Mack*, he concludes that the prosecution could not rely on a permissive inference of knowledge in this case, so the record was insufficient as a matter of law to support his conviction. We disagree.

8. We initially note that the prosecution in this case was required to show that appellant *knowingly* used cocaine in order to establish a violation of Article 112a. *See United States v. Ford, supra; United States v. Harper*, 22 MJ at 162; para. 37c(5), Part IV, Manual for Court-Martial, United States, 1984. However, the prosecution was not required to use scientific evidence to show that appellant's ingestion of cocaine was *knowing*, and it did not attempt to do so in the present case. Instead, it relied on a permissive inference of wrongfulness, including knowledge, which can be drawn from proof of presence of the drug's constitutent elements in a person's urine. *See United States v. Ford*, 23 MJ at 336; *United States v. Harper, supra* at 162-63.

9. Our decision in *Mack* considered the legal sufficiency of scientific proof to show the predicate for the above-noted permissive inference of knowledge, *i.e.*, proof

of drug ingestion. *See United States v. Thompson*, 34 MJ 287 (CMA 1992); *United States v. Boulden*, 29 MJ 44 (CMA 1989). In *Mack*, the record showed that a single sample of the accused's urine tested twice by different laboratories had inconsistent and particularly unexplained results. On the other hand, there was only one laboratory analysis in this case, and the expert testimony was unequivocal that the resulting nanogram count showed ingestion of cocaine. Accordingly, appellant's reliance on *Mack* in his case is neither persuasive nor particularly apt.

10. It is true, however, that Doctor Sweet *on cross-examination* did admit "that 1793 nanograms is also consistent with the possibility of unknown ingestion." Moreover, he explained to the judge that this value on the test could be produced by giving "a small enough dose without their [the user's] knowledge and with no sufficent physiological or psychological symptoms." Thus, appellant asserts that the prosecution should not be allowed to rely on the permissive inference of knowledge where it also introduces evidence purportedly contradicting that inference.

11. We resolved a similar question years ago in *United States v. Ford*, 23 MJ at 336. There, this Court said:

> This defense evidence challenges the existence of the fact to be inferred, wrongfulness and, more particularly, knowledge. Our case law has established that testimony by an accused that he did not knowingly use drugs and cannot honestly account for its presence in his body is sufficient to raise an issue of innocent ingestion. *United States v. Grier*, 6 USCMA 218, 19 CMR 344 (1955). While his additional explanation concerning his wife could be considered speculative by the factfinder, *see United States v. Greenwood*, 6 USCMA 209, 19 CMR 335 (1955), it arguably added some weight to his basic

> denial of knowledge. *See United States v. Hughes*, 5 USCMA 374, 378, 17 CMR 374, 378 (1954). In any event, evidence which contradicts directly or circumstantially the inference to be drawn does not *per se* bar drawing the inference or require that the prosecution introduce evidence that appellant's wife did not secretly plant marijuana in his food. Instead, the prosecution had to persuade the members beyond a reasonable doubt on credibility and probability grounds that this evidence should be disbelieved and the inference should nonetheless be drawn and given such weight to find knowledge beyond a reasonable doubt. *See generally* 30 Am.Jur.2d, *Evidence* §§ 1081, 1083-84 (1967). Accordingly, the evidence is not insufficient on this basis.

(Footnote omitted.)

12. Turning to appellant'se case, we note that Doctor Sweet's initial testimony did not directly or indirectly contradict an inference of knowing use in this case. His testimony simply established that the laboratory tests conducted did not show knowledge. The record states:

> Q: Okay, and you can't tell from the test whether somebody knew they were ingesting cocaine or whether they didn't know.
>
> A: That is correct. That information is not recorded on the molecules.

Moreover, his later testimony that the particular nanogram count in this case could be caused by unknowing ingestion raised only a theoretical possibility of conflict with the inferred fact of knowledge. *See United States v. Johnson*, 42 F.3d 1312, 1319 (10th Cir. 1994) (Evidence "need not negate all possibilities except guilt."), *cert. denied*, —— U.S. ——, 115 S.Ct. 1439, 131 L.Ed. 2d 318 (1995). Finally, Mr. Tucker's testimony concerning appellant's apparent purchase of cocaine within the time period of inferred use provided a substantial

basis for discounting even that theoretical possibility in appellant's case. Accordingly, we conclude that the showing of such a possibility of unknowing ingestion did not preclude drawing the inference of knowledge in this case or otherwise render this record legally insufficient to support appellant's conviction for drug use. *See also United States v. Jensen,* 41 F.3d 946, 954 (5th Cir. 1994), *cert. denied,* —— U.S. ——, 115 S.Ct. 1835, 131 L.Ed.2d 754 (1995); *United States v. D'Amato,* 39 F.3d 1249, 1257 (2d Cir.1994).

The decision of the United States Air Force Court of Military Review is affirmed.

Judges COX, CRAWFORD, GIERKE and WISS concur.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

Airman Basic DAVID PABON, FR 116-56-7005
United States Air Force
ACM 29878

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25 March 1994

Sentence adjudged 26 February 1992 by GCM convened at Eaker Air Force Base, Arkansas. Military Judge: Peter R. Held (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 10 months, and forfeiture of $350 pay per month for 10 months.

Before

SNYDER, RAICHLE, and YOUNG
Appellate Military Judges

OPINION OF THE COURT

YOUNG, Judge:

A military judge convicted appellant of wrongful use of cocaine and sentenced him to a dishonorable discharge, confinement for 10 months, and forfeiture of $350 pay

per month for 10 months. Appellant assigns three errors: (1) the military judge erred by failing to suppress appellant's urinalysis results; (2) the military judge erred by refusing to order the government to provide additional tests of appellant's urine sample; and (3) appellant was selectively prosecuted. We disagree and affirm.

I. Facts

Appellant was scheduled to be tried by court-martial for larceny and drug related charges in August 1991. Two days before trial, Special Agent Kreiger, Air Force Office of Special Investigations (AFOSI), met with Mr. Tucker, an informant, to try to convince him to testify against appellant. Mr. Tucker had provided the incriminating information against appellant which led to the charges in that trial. During the meeting, Mr. Tucker told SA Krieger that he had seen appellant purchase cocaine the previous evening. Special Agent Krieger obtained a search and seizure authorization for appellant's urine, and appellant provided a specimen. The specimen tested positive for the presence of benzoylecgonine, a metabolite of cocaine.

II. Motion to Suppress the Urinalysis Results

Prior to entering his plea, appellant moved to suppress the results of the urinalysis, claiming the search authorization was granted despite a lack of probable cause, and then later, that the information upon which the search authorization was granted was gathered by Special Agent Krieger with reckless disregard for the truth. The military judge denied both motions. Before this Court, appellant assigns only the latter as error, but in his brief, he also alleges that the search authority lacked probable cause. We will deal with these issues separately.

A. Government Agent's Reckless Disregard for the Truth

At trial, the defense alleged that the government informant, Mr. Tucker, was unreliable and that Special Agent Krieger recklessly disregarded the truth of Tucker's unreliability in briefing the search authority. Appellant asserts Tucker was unreliable because he continued to use cocaine while working for AFOSI, he stole money from his job on base in order to buy illegal drugs, and he stole from his mother's business causing it to go bankrupt. Appellant believes Special Agent Krieger had a duty to discover this information and brief it to the search authority. The military judge found that Special Agent Krieger (1) was unaware of this information, (2) did not act in reckless disregard of the truth, and (3) even if he did act in reckless disregard of the truth, the other evidence provided to the search authority was sufficient to establish probable cause.

If the defense establishes by a preponderance of the evidence that a government agent made a false statement knowingly and intentionally, or in reckless disregard of the truth, to the search authority, and the false statement was necessary to the finding of probable cause, the prosecution must show by a preponderance of the evidence that the evidence remaining after the false information is set aside is sufficient to establish probable cause: If the prosecution fails to meet this burden, the evidence must be suppressed unless the search is otherwise lawful under the Military Rules of Evidence. Mil. R. Evid. 311(g)(2); *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

We analyze a government agent's omission of information in the same manner as misrepresentations. "Omissions do not 'undermine probable cause' unless they are intentional or made 'with reckless disregard for the' accuracy of the information. Merely 'negligent omissions' do not 'undermine' probable cause." *United States v.*

Figueroa, 35 M.J. 54, 56 (C.M.A. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 1257, 122 L. Ed. 2d 655 (1993) (quoting *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980)); *see United States v. Miller*, 753 F.2d 1475 (9th Cir. 1985) (officers tried to check informant's background, but failed to learn of prior perjury conviction or bizarre behavior upon his arrest by another agency; this amounted to only negligence).

The military judge's finding that Special Agent Krieger's statement to the search authority was neither reckless nor dishonest is a factual determination which we will review under the clearly erroneous standard. *United States v. Taxacher*, 902 F.2d 867, 871 (11th Cir. 1990) *citing United States v. Cancela*, 812 F.2d 1340, 1343 (11th Cir. 1987), *cert. denied*, —— U.S. ——, 111 S. Ct. 1307, —— L. Ed. 2d —— (1991). We conclude that the military judge's findings are based on the evidence of record and are not erroneous. Special Agent Kreiger made the normal inquiries to determine if Mr. Tucker had a criminal record; he did not. Special Agent Kreiger was also aware of the high regard other law enforcement agencies had for Mr. Tucker's veracity concerning drug operations, and had himself been able to verify some of the information Mr. Tucker provided.

Assuming *arguendo* that Mr. Tucker had continued to use cocaine and had stolen money from his employer, we doubt that would substantially alter the search authority's evaluation of his credibility with respect to appellant's use of cocaine. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985).

B. Probable Cause for the Search and Seizure

Despite our plenary powers under Article 66, UCMJ, normally, our duty to review search authorizations will be limited to ensuring "that the commander 'had a substantial basis for . . . conclud[ing] that probable cause existed.'" *Figueroa*, 35 M.J. at 56 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2332, 76 L. Ed.

2d 527 (1983)). Although we have de novo fact-finding power, usually, we will accept the military judge's findings of fact, as to what matters were presented to the search authority, unless they are unsupported by the evidence of record or clearly erroneous. *See United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985).

"Probable cause to search exists when there is a reasonable belief that the person, property or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(f)(2). Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is evidence of a crime. Mil. R. Evid. 316(b). In this case, the search authority had to decide whether, given all the circumstances provided to him, a fair probability existed that appellant's urine contained evidence of illegal drug use. *Figueroa*, 35 M.J. at 56 *citing Gates*, 462 U.S. at 238-39, 103 S. Ct. at 2332.

The defense alleges the search authority, Colonel Lentz, did not have sufficient information about the informant's reliability upon which to find probable cause. On this motion at trial, the military judge heard the testimony of Special Agent Krieger and was provided the stipulated testimony of Colonel Lentz. The military judge found that Special Agent Krieger told Colonel Lentz "the informant had worked for the [AFOSI] in the past, had proven reliable in the past, and was the same informant who had previously provided information on the accused in the past." We agree with, and adopt as our own, the military judge's findings of fact. We hold that Colonel Lentz was briefed on the informant's reliability and had a substantial basis for concluding that probable cause existed.

III. Motion to Compel Additional Government Testing of Evidence

At trial, the military judge denied appellant's motion to compel the government to test appellant's urine for ecgoninemethylester (EME) and raw cocaine, and to

retest for benzoylecgonine (BE). Before this Court, appellant claims the military judge's ruling was prejudicial error.

When necessary for an adequate defense, Air Force members are entitled to expert assistance from the investigative stage through the appellate process. *United States v. Robinson,* —— M.J. —— (C.M.A. 4 March 1994); Article 46, UCMJ, 10 U.S.C. § 846 (1988); R.C.M. 703 (d). The burden is on the defense to demonstrate the necessity for the services. *United States v. Garries,* 22 M.J. 228, 291 (C.M.A. 1986), *cert. denied,* 479 U.S. 985 (1986). We will test the military judge's ruling for an abuse of discretion. *Robinson,* —— M.J. at ——.

In support of the motion, the defense presented a transcript of the testimony of a forensic toxicologist from another court-martial. The toxicologist testified that, depending upon the length of time between the ingestion of cocaine and the giving of the specimen, an analysis of the urine would reveal the presence of BE, raw cocaine, and EME. Raw cocaine would be found up to 10 hours after use, EME up to 48 hours, and BE, at the Department of Defense cutoff level, for up to 72 hours. Therefore, one would not expect an unadulterated sample to contain both raw cocaine and BE, but no EME. A government toxicologist testified for the prosecution that placing raw cocaine in a urine sample would produce BE by hydrolysis only if the acidity (pH) and temperature of the urine were within a specific range. He asserted that 2 percent of the population lack the enzyme necessary to produce the EME metabolite and that because of poor isolation techniques in manufacturing, BE and EME are often present in raw cocaine purchased on the street. Appellant stipulated to the chain of custody of the specimen once it left the possession of the lab technician who observed appellant urinate. Appellant testified to the circumstances surrounding his providing the specimen, apparently in an effort to show that someone could have tampered with it;

however, his testimony only established the chain of custody of the specimen from the time the urine left his body until the bottle was sealed with tamper-resistant tape. The military judge concluded that the defense had provided no credible evidence to show tampering with appellant's specimen or a deficiency in the chain of custody. Therefore, he denied the motion because the defense had failed to show the additional testing would be relevant and necessary. We concur in the military judge's findings and therefore conclude that he did not abuse his discretion in denying the motion.

IV. Selective Prosecution

At trial and on appeal, appellant asserts that he was discriminatorily selected for prosecution because of his race. He testified that military members belonging to racial minorities were tried by courts-martial and punished under Article 15, UCMJ, in numbers out of proportion to their numbers on the base.

Public officials have broad discretion in making decisions to prosecute. "There is a strong presumption that the convening authority performs his duties as a public official without bias. *United States v. Hagen,* 25 M.J. 78, 84 (C.M.A. 1987), *cert. denied,* 484 U.S. 1060, 108 S. Ct. 1015, 98 L. Ed. 981 (1988). The test for selective prosecution is well established.

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie,* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

United States v. Garwood, 20 M.J. 148, 154 (C.M.A. 1985), *cert. denied*, 474 U.S. 1005, 106 S. Ct. 524, 88 L. Ed. 456 (1985), *quoting United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).

Appellant failed to establish either prong of the test. He did not show that others similarly situated have not been prosecuted for using cocaine. Furthermore, he failed to show that the government singled him out for prosecution because of his race. His use of statistics is not persuasive. *See McClesky v. Kemp*, 481 U.S. 282, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

V. Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of appellant was committed. Articles 59(a), 66(c), UCMJ. Accordingly, the findings and approved sentence are

AFFIRMED.

Senior Judges SNYDER and RAICHLE concur.

[SEAL]

OFFICIAL

/s/ Alvin J. Stribling
ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator,
AFCMR

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